No. 14-419

Supreme Court, U.S.
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In The Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in *pro bono* legal representation for individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

The Rutherford Institute is interested in this case because it is committed to ensuring the continued vitality of the Sixth Amendment's core guarantee to a criminal defendant's counsel of choice and believes that the Government's abusive forfeiture tactics seriously undermine this right.

SUMMARY OF THE ARGUMENT

The Government brought a civil action under 18 U.S.C. § 1345 to freeze Petitioner's assets, including assets entirely unrelated to her alleged crime and which were legitimately obtained. In this

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

amicus brief, the Institute focuses on how the drafters of the Constitution understood civil forfeitures and its relationship to a criminal defendant's Sixth Amendment right to choose counsel. That history demonstrates that the Founding Fathers would have viewed the seizure here—of a person's untainted and legitimate assets—a constitutional anathema.

First, the Government's seizure of legitimate, untainted assets is akin to the *in personam* forfeitures the Founding Fathers rejected in Article III of the Constitution. The First Congress banned these forfeitures because they were unduly harsh and unnecessary, and prohibited them for all federal crimes.

Second, the forfeiture at issue here is inconsistent with the Founding Fathers' understanding of the Sixth Amendment right to counsel. When Congress ratified that Amendment, the country recognized only a right to counsel that a defendant could afford. Though the courts later expanded the Sixth Amendment to include the right to appointed counsel, *see, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963), this expansion did not subvert the original intent of the Founding Fathers. Allowing the Government to execute a pretrial seizure of legitimate and untainted funds undermines that basic right by denying Petitioner her right to a counsel she could afford had the Government not seized her legitimate assets.

ARGUMENT

The Government asks this Court to endorse an abusive practice the Founders explicitly rejected and which contradicts their understanding of the limited seizures the Government could undertake prior to a finding of guilt. In so doing, the forfeiture improperly undermines Petitioner's Sixth Amendment right to counsel of her choosing.

I. The Founders Explicitly Rejected Forfeiture of Untainted Assets

The Government advocates for an *in personam* civil forfeiture: one based on the defendant's potential liability rather than on any taint attributable to the seized funds themselves. But the Constitution explicitly bans *in personam* forfeitures for treason, and the First Congress explicitly prohibited such forfeitures for all federal crimes.

Forfeiture is "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Black's Law Dictionary* 765 (10th ed. 2014). Civil forfeiture,[2] the process the Government used here to deprive Petitioner of her *untainted* assets, has been understood as a "proceeding brought by the government against property that either facilitated a crime or was

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[2] By contrast, criminal forfeiture is "[a] governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior." *Black's Law Dictionary* 765 (10th ed. 2014).

acquired as a result of criminal activity." *See id.*; *see also* David J. Taube, *Civil Forfeiture*, 30 Am. Crim. L. Rev. 1025, 1025 (1993).

Historically, England recognized three types of forfeitures: (1) deodand (the forfeiture of property that caused the death of a subject of the Crown), (2) forfeiture after conviction for a felony or treason, and (3) statutory forfeiture of certain offending property. *See Austin v. United States*, 509 U.S. 602, 611 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974).

A. *In Rem* Forfeitures

Like the seizure of *tainted* assets this Court approved in *Kaley v. United States*, 134 S. Ct. 1090 (2014), English *in rem* forfeitures—including deodand and statutory forfeiture—centered on the character of the offending property, such as assets that the defendant had used in violation of the customs and revenues laws. *See Calero-Toledo*, 416 U.S. at 681-82; *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-38 (1943).[3]

This sort of *in rem* forfeiture took root in the United States, *see Austin*, 509 U.S. at 613, based on

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[3] For example, violation of the Navigation Acts of 1660 (which required the shipping of most commodities via English vessels) resulted in a forfeiture of the offending goods and the vessel transporting them. *See, e.g.*, *Austin*, 509 U.S. at 612.

"the fiction that the action was directed against 'guilty property,' rather than against the offender himself." *United States v. Bajakajian*, 524 U.S. 321, 330 (1998). Though the Founding Fathers considered *in rem* forfeitures as necessary "to guard the revenue laws from abuse,"[4] early American forfeiture statutes sharply limited the scope of the forfeiture to the offending cargo or the transporting ship. Reed, *supra*, at 258.[5]

B. *In Personam* Forfeitures

Unlike *in rem* forfeitures based on the tainted nature of the seized assets themselves, the forfeiture at issue here is *in personam*, *i.e.*, it is based on Petitioner's potential liability if convicted of Medicare fraud.

When the Founders drafted the Constitution, English law recognized forfeitures after conviction for a felony or treason based on the individual's adjudicated guilt rather than on the property's taint. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827)

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[4] Terrance G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 257-58 (1994) (internal quotation marks and citation omitted).

[5] Subsequent statutes involved the seizure and forfeiture of distilleries and related property used in the course of defrauding the United States of tax revenues from alcoholic beverages sales. *United States v. 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 120 (1993) (plurality).

(Story, J.). Indeed, English law historically defined "felony" as "an offense which occasions a total forfeiture of either lands or goods or both." *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir. 1980).

When a defendant was convicted of a felony or treason, his "blood was corrupted" so that nothing could pass to the next generation by inheritance. 1 J. Bishop, *New Commentaries on the Criminal Law* 585 (8th ed. 1892) ("When a man has committed against the community a wrong so flagrant as to unfit him to be a member of it, the corruption of blood isolates him, so that he cannot exercise the rights violated; and the forfeiture puts back what the community had given him.").[6]

In personam forfeitures served to punish felons and traitors for violating the law and was rooted in the belief that these individuals did not deserve to own property. *Austin*, 509 U.S. at 612; *cf. The Palmyra*, 25 U.S. at 14 ("It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of consequence "). These

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[6] *See Calero-Toledo*, 416 U.S. at 682 ("The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.").

forfeitures issued only after an adjudication of guilt. *See The Palmyra*, 25 U.S. at 14 ("[N]o right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender.").[7]

Public opinion in early America condemned these forfeitures as unduly harsh, especially given the effect on innocent relatives. *See* Bishop, *supra*, at 585; J. Kent, *Commentaries on American Law* 385 (5th ed. 1844) ("[T]he tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony, as being an unnecessary and hard punishment of the felon's posterity.").

Crucially, the Founding Fathers ***rejected*** the English tradition of *in personam* forfeitures: the Constitution explicitly banned forfeitures for treason. U.S. Const. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted."). And the First Congress abolished *in personam* forfeitures for all federal crimes. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("[N]o conviction or judgment shall

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[7] *See also id.* ("The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction.").

work corruption of blood, or any forfeiture of estate
"); *see* Bishop, *supra*, at 585-86. Congress reenacted this ban several times.[8]

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[8] *See* Rev. Stat. § 5326 (1875); Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1159; Act of June 25, 1948, ch. 645, § 3563, 62 Stat. 837, codified at 18 U.S.C. § 3563 (1982 ed.); repealed effective Nov. 1, 1987, Pub. L. 98-473, 98 Stat. 1987.

Congress departed from its strict ban on *in personam* forfeitures only once before 1970. The Confiscation Act of 1862 authorized the seizure of Confederate soldiers' property. *See* Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589. But the Act was adopted against the Civil War backdrop, and even then, was limited to soldiers' life estates. *See generally Bigelow v. Forrest*, 76 U.S. 339 (1869) (strictly construing the act); *Miller v. United States*, 78 U.S. 268 (1870) (upholding the act under Congress's war powers).

In 1970, Congress resurrected the *in personam* forfeiture penalty for select organized crime and major drug trafficking offenses. *See* Organized Crime Control Act of 1970, 18 U.S.C. § 1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a). But Congress adopted this novel approach because earlier attempts to combat organized crime were not successful. *Alexander v. United States*, 509 U.S. 544, 561-62 (1993) (Kennedy, J., dissenting). Congress therefore determined that "an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." S. Rep. No. 91-617, at 79 (1969). In doing so, Congress acknowledged that they

In choosing to adopt the English tradition of *in rem* forfeitures but to reject those based on *in personam* liability, the Founding Fathers plainly rejected the seizure of entirely untainted assets at issue in this case. The seizure at issue here, like the *in personam* forfeitures the Founding Fathers rejected, is "an unnecessary and hard punishment of the felon's posterity," Kent, *supra*, at 385, especially since the Government imposed the forfeiture even before an adjudication whether Petitioner is or is not a felon.

II. The Forfeiture Here Improperly Undermines the Historic Sixth Amendment Right to Counsel That a Criminal Defendant Could Afford

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The idea that a court could prevent a defendant from using his own untainted assets to retain counsel is belied by the historical development of the Sixth Amendment. England historically prohibited counsel for criminal defendants in serious

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were departing from centuries of precedent: "[C]riminal forfeiture represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." *Id.*

criminal cases.[9] 1 F Pollock & F. Maitland, *The History of English Law* 211 (2d ed. 1898). English lawmakers perceived this prohibition as necessary to maintain peace and order. *See* J. Tomkovicz, *The Right to the Assistance of Counsel* 3-4 (2002). Moreover, the common law did not subscribe to a presumption of innocence, and the assistance of counsel was perceived as an impediment to efficient prosecution and punishment. *Id.* at 4.

Against this backdrop, the Founders of this country began to reject England's common law rule even before ratification of the Sixth Amendment. *See Holden v. Hardy*, 169 U.S. 366, 386 (1898) ("Even before the adoption of the constitution, much had been done towards mitigating the severity of the common law, particularly in the administration of its criminal branch. [T]o the credit of her American colonies, let it be said that so oppressive a doctrine [denying the assistance of counsel] had never obtained a foothold there."). Most colonies enacted early statutes that recognized a right to counsel of choice. *See* Beaney, *supra*, at 14-18, 25. After the Revolution, many states enacted similar constitutional provisions "intended to do away with

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[9] This practice began to slowly change before the American Revolution, but did not include the right to retain counsel in all cases. W. Beaney, *The Right to Counsel in American Courts* 8-11 (1955).

the rules that denied representation, in whole or in part, by counsel in criminal prosecutions." *Betts v. Brady*, 316 U.S. 455, 466 (1942); *see also* Beaney, *supra*, at 18-22, 25.

When Congress ratified the Sixth Amendment, they understood the constitutional right to counsel as the right to counsel a defendant could afford to retain. This was evident because the right to appointed counsel had not yet been recognized as fundamental in all criminal cases. *See generally Gideon*, 372 U.S. 335 (overruling *Betts*).[10]

Congress's contemporaneous actions confirm this original understanding. ***First***, Congress enacted a law just before the passage of the Sixth Amendment, providing that in federal court, "the parties may plead and manage their own causes personally or by the assistance of such counsel or

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[10] In the last half century, the Sixth Amendment has been expanded to encompass a right to appointed counsel for indigent defendants. *Cf. Powell v. Alabama*, 287 U.S. 45, 71 (1932) ("[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law "); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (requiring appointment of counsel for all federal criminal defendants who could not afford a lawyer); *Gideon*, 372 U.S. at 344-45 (extending a criminal defendant's federal constitutional right to counsel to state court).

attorneys at law as by the rules of the said court shall be permitted to manage and conduct causes therein." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73; *see* Beaney, *supra*, at 27-28. ***Second***, several months before the Sixth Amendment was ratified, Congress enacted legislation to permit "[e]very person who is indicted of treason or other capital crime [ ] be allowed to make his full defense by counsel learned in the law." Act of Apr. 30, 1790, ch. 9, 1 Stat. 118. The Act further provided that upon the defendant's request, the court must immediately "assign to him counsel." *Id.* This limited statutory right to appointed counsel would have been superfluous if the Sixth Amendment right to counsel already included this guarantee. *See* Tomkovicz, *supra*, at 20.

The forfeiture at issue here is fundamentally inconsistent with the Founding Fathers' understanding that criminal defendants had a right to choose any counsel they could afford. By depriving Petitioner of legitimate and untainted funds, the forfeiture prevents her from securing chosen counsel by making it impossible for her to pay that counsel.

The Sixth Amendment has always encompassed the core right of securing one's counsel of choice at one's own expense. In fact, it was the only understanding at the time it was ratified. The idea that the government could trample on this fundamental right with a tool that was despised by

the Founders is inconceivable. The historical context cuts directly against the Government's position in this case.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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